ISSUED APRIL 3, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

JILLIAN'S BILLIARD CLUB OF PASADENA dba Jake's Billiards 38 West Colorado Boulevard Pasadena, California 91105, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6868 File: 47-286561 Reg: 96037986 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: February 4, 1998 Los Angeles, CA

Jillian's Billiards Club of Pasadena, doing business as Jake's Billiards (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 30 days, for appellant's bartender having sold an alcoholic beverage, a glass of Miller Lite beer, to a 15-year-old minor decoy, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Jillian's Billiards Club of Pasadena,

[1]The decision of the Department, dated May 8, 1997, is set forth in the appendix.

appearing through its counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on August 31, 1993. Thereafter, the Department instituted an accusation against appellant charging that on June 14, 1996, appellant's bartender, Gary Vander-Schuit, sold a glass of Miller Lite beer to Domino Scott, a 15-year-old police decoy.

An administrative hearing was held on March 10, 1997, at which time oral and documentary evidence was received. Scott testified that she entered the premises, went to the bar area, and ordered a Miller Lite. The bartender drew from a tap and placed the glass in front of her. He accepted the $10 bill she tendered, gave her change, and at no time did he ask for nor was he shown any identification. The transaction was observed by Marie Sell, an officer with the Pasadena Police Department who, with a fellow officer, was conducting the decoy operation. Officer Sell advised the bartender he had just sold beer to a 15-year-old minor, and pointed to the minor.

The Administrative Law Judge found that the violation had occurred as alleged. However, he rejected the Department's recommendation of a 15-day suspension, with 5 days stayed, as "incredibly lenient," and instead imposed a 30-day suspension, emphasizing the fact that the decoy was only 15 years old, that she had no problem whatsoever in buying the beer, and that appellant showed no remorse for making the sale.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises

the following issues: (1) the decision is not supported by its findings and its findings are not supported by substantial evidence, because of the manner in which the decoy operation was conducted; (2) the entire proceeding is tainted by virtue of the unconstitutionality of Business and Professions Code §24210; and (3) the penalty is excessive.

DISCUSSION

I

Although appellant challenges the sufficiency of the findings to support the decision, and contends there is not substantial evidence to support the findings, the main force of its brief is directed at the manner in which the decoy operation was conducted. Appellant argues that the decoy operation was governed by the Department's guidelines and by Rule 141, but "hardly any of those requirements ... were not contravened." (App.Br. 4).

Appellant contends there was no notice given to licensees prior to the inception of the decoy operation; the decoy was wearing makeup and jewelry; the buy money was not retained; the beverage purchased was not produced or analyzed; the decoy did not have the appearance of someone well under the age of 21 years; and the decoy was not compelled to make a face to face identification of the bartender. As a consequence, appellant argues, the record demonstrates gross police misconduct as well as entrapment.

Appellant's contention that the police officer did not comply with the Department guidelines is without merit. As the Board has observed on a number of occasions, the guidelines do not bind the police officer. Rule 141 does, however, but we find nothing

in the record to warrant setting the Department's decision aside because of a violation of the rule.

Rule 141 does not require that prior notice of a decoy operation be provided. While notice is customarily given, and is suggested in the Department guidelines, it is not mandatory, and its absence does not provide a basis for setting aside the decision.

Rule 141 is also silent on the subject of whether makeup or jewelry may be worn by the decoy. The minor admitted she was wearing lipstick and mascara on the night in question, and a watch. She described the amount of her makeup as being the same as when she was testifying - "not heavy." The ALJ saw her essentially as the bartender would have seen her, and concluded that "she still looked like a 15-year-old girl" (Finding IV-A). A photograph of the minor was placed in evidence (Exhibit 3), and it supports the ALJ's conclusion as to her youthful appearance. In any event, appellant presented no witnesses, so there is no evidence that appellant's bartender may have been misled by the minor's appearance, even if that were a genuine issue.

As the Department notes, a sample of the beer was present at the hearing [RT 16]. It is true it was not analyzed for alcoholic content. However, the minor testified she requested Miller Lite beer, so it is presumed the beverage in the glass that was given to her contained Miller Lite beer. Additionally, the minor testified that the beer came from a tap, and that one of the taps in the area from which the bartender drew the liquid was labeled "Miller Lite,"[2] as well as testimony from the police officer that the glass appeared

[2] In its recitation of the facts, appellant asserts that the minor testified there was no label on the tap from which the bartender filled the glass (App.Br. 3). This assertion is incorrect. The minor said she could not see the label because the bartender was standing in front of the tap at that time [RT 29].

to be the type of glass in which beer was served, and that the contents appeared to be beer.

It is also true that the buy money was not produced at the hearing. According to the Department, the money was available and subject to subpoena had appellant believed it to be evidence relevant to a defense. Since the sale itself was not disputed, the absence of the buy money was immaterial.

Finally, appellant's contention there was no face-to-face identification of the seller is also unpersuasive. While it is true the minor did not point to the seller and say "that's the man!," it is also true that the police officer informed the bartender he had just sold beer to a 15-year old, and pointed to her, who at that moment was the only other person at the fixed bar.

The Department states in its brief that, because the decoy was the only one at the bar counter, the contact by the police came immediately after the beer was served, the decoy was pointed out to the bartender, and the bartender apologized, "under these circumstances, the rational [sic] of the rule was met."

We wish to emphasize that more is expected than merely meeting the rationale of the rule. If police persist in complying only marginally with Rule 141, this Board can expect to begin receiving cases where compliance falls short.of meeting the rule's rationale. Reversal will necessarily follow.

II

Appellant contends the entire proceeding was defective because, it alleges, Business and Professions Code §24210, which permits the Department to employ administrative law judges to conduct its hearings, is unconstitutional.

The Appeals Board is constitutionally barred from declaring an act of the Legislature unconstitutional where there has not been a previous decision of an appellate court so holding. (Cal. Const., art. 3, §3.5.) The Board is unaware of any such decision, and appellant has cited none. We therefore decline to consider appellant's contention.

III

Appellant contends the penalty is excessive. More specifically, appellant contends that the suspension which was ordered, 30 days, was more severe than the penalty for which the case could have been settled before the administrative hearing,[3] as well as the penalty recommended by Department counsel at the close of the hearing,[4] for the purpose of punishing appellant for asserting its rights at a hearing.

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

Appellant's contention that the penalty is more severe than what it claims was offered prior to the administrative hearing is specious. First, there is no evidence in the

[3] Appellant asserts that had it agreed to stipulate to the charge, the penalty would have been a 15-day suspension, with 5 days thereof stayed. There is no evidence in the record that this was the case. In any event, as we point out in the text, the proposal is in the nature of a settlement offer, and is not binding on the Department.

[4] Department counsel recommended a 15-day suspension, with 5 days stayed.

record that the case could have been settled on the terms appellant suggests.

Second, appellant assumed the risk that it might not fare as well after a hearing, at which facts could emerge that might alter the Department's original assessment of the character of the violation.

The issue of the Department's ability to impose a penalty after a hearing greater than it had offered prior to the hearing was addressed long ago in Kirby v. Alcoholic Beverage Control Appeals Board (1971) 17 Cal.App.3d 255 [94 Cal.Rptr. 514]. Viewing the initial proposal as in the nature of a settlement proposal, the court stated (17 Cal.App. 3d at 260-261):

> "Even in cases strictly criminal, there is a public policy in favor of negotiations for compromise ...; a fortiori there is an equal policy in cases such as this. The department, acting on the basis of written reports, secures a prompt determination, at little administrative cost; the licensee avoids the risks that testimony at a formal hearing may paint him in a worse light than the reports and, also, avoids the costs and delay of a hearing. The licensee who rejects a proffered settlement hopes that the hearing will clear - or at least partially excuse - him and he hopes that even if he is not found innocent, he will be dealt with less harshly than the department proposes. But if the department can never, no matter what a hearing may develop, assess a penalty greater than that proposed in its offer, a licensee has little to lose by rejection. Only the cost of a hearing is risked; he could not otherwise be harmed. In that situation, licensees would be induced to gamble on the chance of prevailing at the trial, while the department would lose much of its inducement to attempt settlement. The law should not permit that kind of tactic by an accused.
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> "It follows that the mere fact - if it be a fact - that the department had once offered a settlement more favorable than the discipline ultimately imposed is not, in and of itself, a ground for setting aside the penalty ultimately adopted."

In the last analysis, the question is whether there is a rational basis in the record for the ALJ's determination of what he believed was an appropriate level of discipline.

The ALJ based the penalty on three factors - the age of the minor decoy, the ease with which she was able to buy an alcoholic beverage, and the fact that appellant

showed no remorse.

The first two factors are, we believe, legitimate considerations. The ALJ found, and the photograph which is in evidence supports his finding, that the minor presented the appearance of a 15-year-old. Nonetheless, she was not asked for any identification, and there no evidence that anything might have distracted the bartender or prevented him from observing her and realizing he had no business selling her a glass of beer. To the extent the ALJ felt a more stringent penalty was deserving, that was well within his discretion.

However, we think that it was error for the ALJ to increase the penalty because appellant had not shown any remorse for making the sale.

It is difficult to determine what led the ALJ to conclude appellant had not shown remorse, since he did not explain the reason he came to such a conclusion. We have reviewed the record, and are unable to find anything which could be said to show either remorse or lack of remorse.

If we were to accept the Department's reading of the transcript, it could be said there is evidence of remorse in the record. The Department states in its brief (Dept.Br. 4) that appellant's bartender apologized to the police officer, citing pages 10-12 of the hearing transcript. We have reviewed the cited pages. We are inclined to think that what the transcript shows is the police officer apologizing for her inability to remember things about which she was asked, rather than referring to an apology extended to her by the bartender.

While the ALJ is not bound by the Department's recommendation, a departure from it invites an explanation. The explanation which has been given is not acceptable,

since it assumes or speculates about a matter as to which the record is silent.

In prior cases, the Board has been told the Department's standard penalty recommendation in minor decoy cases is ten days. Here the Department enlarged its recommendation, presumably because of the special facts of the case. While a penalty such as that recommended to the ALJ by Department counsel might appear to this Board to be more appropriate, and reflective of the Department's best thinking at the time, we recognize that it is the Department, and not this Board, which, in the lawful exercise of its discretion, must determine what the penalty shall be.

CONCLUSION

The decision of the Department, except as to penalty, is affirmed. The penalty determination is reversed, and the case is remanded to the Department for reconsideration of the penalty in light of the views expressed herein.[5]

BEN DAVIDIAN, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[5]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.